



California Fair Political Practices Commission

November 9, 1988

Earl Nicholas Selby
Attorney at Law
420 Florence Street
Palo Alto, CA 94301

Re: Your Request for Advice
Our File No. A-88-387

Dear Mr. Selby:

You have requested advice concerning the lobbying disclosure provisions of the Political Reform Act.^{1/}

QUESTION

Is participation in settlement conferences or workshops conducted by the California Public Utilities Commission in connection with ratemaking proceedings included in the definition of "administrative testimony" for purposes of determining whether you qualify as a "lobbyist" under the Act?

CONCLUSION

Persons who participate in the types of conferences or workshops you describe are not engaging in "administrative testimony" as that term is defined in Regulation 18239 and may qualify as "lobbyists" if they meet the tests set out in the regulation.

FACTS

You represent clients before the California Public Utilities Commission ("CPUC") in connection with ratemaking proceedings. Your letter states that, to reduce the need for lengthy hearings, the CPUC's administrative law judges and its Division of Ratepayer Advocates have begun asking parties to participate in "settlement conferences" or "workshops." For example, you stated that approximately two years of hearing in the Diablo Canyon nuclear

^{1/}Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated. Commission regulations appear at 2 California Code of Regulations Section 18000, et seq. All references to regulations are to Title 2, Division 6 of the California Code of Regulations.

power plant rate base proceeding was avoided through the use of a settlement conference. Also, the first phase of a CPUC investigation into alternative regulatory frameworks for local telecommunications exchange carriers was resolved, in large measure, by a stipulation between a significant number of the approximately 30 parties in the proceeding.

Settlement conferences are triggered when matters are scheduled for public hearing by the CPUC, and any agreements reached between the parties are formalized in writing and become part of the official record in the proceedings. However, the settlement conferences themselves are not publicly noticed (other than publication in the CPUC's "daily calendar") and are not recorded.

ANALYSIS

The Act requires lobbyists and their employers or clients to register with the Secretary of State and file periodic reports disclosing money received and spent for the purpose of influencing legislative or administrative action. (Section 86100, et seq.) The term "administrative action" includes ratemaking proceedings. (Section 82002.)

The term "lobbyist" is defined in Regulation 18239 (copy enclosed) as follows:

(a) A lobbyist is any person who, for compensation, engages in direct communication, other than administrative testimony, with a qualifying official for the purpose of influencing legislative or administrative action, and also meets the requirements of either subsection (b) or subsection (c) of this section.

(b) The person receives or becomes entitled to receive at least \$2,000 in compensation in any calendar month for influencing legislative or administrative action. Compensation received by a full time employee engaged primarily to perform services other than influencing legislative or administrative action, or for administrative testimony, shall not be included in computing the amount of compensation in this subdivision.

(c) The person receives or becomes entitled to receive any amount of compensation for engaging in direct communication, other than administrative testimony, with qualifying officials for the purpose of influencing legislative or administrative action on at least 25 separate occasions in any two consecutive calendar months.

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You have asked whether participation in the settlement conferences comes within the regulation's exception for "administrative testimony," which is defined as:

...influencing or attempting to influence administrative action by acting as counsel in, appearing as a witness in, or providing written submissions, including answers to inquiries, which become part of the record of any regulatory or administrative agency proceeding:

(A) Which is conducted as an open public hearing for which public notice is given;

(B) Of which a record is created in a manner which makes possible the creation of a transcript; and

(C) With respect to which full public access is provided to such record or transcript and to all written material which is submitted to become part of the record.

Regulation 18239(d)(1).

Because no public notice is given for settlement conferences and no record of the conferences is created from which a transcript could be made, participation in the conferences does not appear to fall within the definition of "administrative testimony." Therefore, if you meet the qualifying tests set out in Regulation 18239, you must register and file lobbying disclosure reports.

If you have additional questions, please do not hesitate to contact me at (916) 322-5662.

Sincerely,

Diane M. Griffiths
General Counsel

Carla Wardlow

By: Carla Wardlow
Political Reform Consultant

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Ms. Diane Griffiths, Esq.
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RE: Whether Participating in Settlement Conferences at the
California Public Utilities Commission is Included
Within "Administrative Testimony"

Dear Ms. Griffiths:

This letter requests an opinion from the Legal Division of the Fair Political Practices Commission (FPPC) whether a lawyer's participating in "settlement conferences" or "workshops" at the California Public Utilities Commission (CPUC) is within the meaning of "administrative testimony" as defined in the FPPC's regulations.

The facts are as follows. Increasingly, the CPUC is seeking to resolve its cases, in whole or in part, through the use of stipulations and settlements. For this purpose, the CPUC, through its administrative law judges and its public staff division, known as the Division of Ratepayer Advocates, has asked parties to participate in what are (usually interchangeably) referred to as "workshops" or "settlement conferences." Given the large number of parties that may be participating in any given CPUC proceeding, and given the increasing technical complexity of matters before the CPUC, such "workshops" or "settlement conferences" are fast becoming a practical necessity at the CPUC. Recently, for example, perhaps as much as two years of hearing in the Diablo Canyon nuclear power plant rate base proceeding was avoided through the use of a settlement. Also, the first phase of a CPUC investigation into alternative regulatory frameworks for local telecommunications exchange carriers was resolved, in large measure, by a stipulation between a significant number of the approximately 30 parties in the proceeding.

Cases at the CPUC which are scheduled for hearings are "public proceedings": (1) which are conducted as open public hearings for which public notice is given; (2) of which a record is created in a manner which makes possible the creation of a tran-

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script; and (3) with respect to which full public access is provided to such record or transcript and to all written material which is submitted to become part of the record. Scheduling a CPUC case for hearing is what triggers the holding of "workshops" or "settlement conferences." In this sense, a CPUC-sponsored "workshop" or "settlement conference" is held within the context of a "public proceeding," and a lawyer's participating in the "public proceeding" is "administrative testimony," within the FPPC's rules.

What raises a possible doubt is the fact that the "workshops" or "settlement conferences" are held without a court reporter present and without a record being created through a transcript. Indeed, it would be inconceivable that these "workshops" or "settlement conferences" could succeed, even in part, if they were conducted on the record, in front of a court reporter creating a transcript; parties would be unwilling to discuss the merits of their positions if they thought it possible that no settlement would be achieved and that their statements could be used against them in a later hearing. In other words, the entire point and purpose of these "workshops" or "settlement conferences" is to provide the parties with an opportunity to engage in a frank and open discussion of the merits of their positions off the record. To date, CPUC the "workshops" and "settlement conferences" with which I am familiar have all been held outside the presence of any administrative law judge or commissioner.

Although the CPUC's "public proceedings" are conducted pursuant to public notice in the CPUC's official Calendar, which is published daily, the CPUC does not usually publish notice of "workshops" or "settlement conferences" per se. Instead, the CPUC publishes in its daily Calendar the dates of prehearing conferences and hearings; if any member of the public attended a prehearing conference or the first scheduled hearing, that person would readily gain notice of the dates, times and places of the "workshops" or "settlement conferences." All known parties to the proceeding are notified of the "workshop" or "settlement conference." The "workshops" or "settlement conferences" are held in the CPUC's public hearing rooms; however, they may also be held in other CPUC conference rooms which are likewise fully open to the public.

Because of the complexity of CPUC cases, a "workshop" or "settlement conference" may continue for several days or even longer. It is comparatively easy for a lawyer to quickly exceed the \$2,000 lobbyist compensation threshold.

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At the conclusion of the "workshops" or "settlement conferences," the parties will, if their effort to produce a stipulation or settlement has been successful, reduce their agreement to writing and submit the document to the assigned Administrative Law Judge for his/her review. The submission is made by a formal written motion served on all parties to the proceeding, who then are given an opportunity to submit arguments why the stipulation or settlement should be accepted or rejected by the CPUC. Thus, full public access is provided to the stipulation or settlement. The document becomes part of the CPUC's official record in the proceeding.

If the effort to produce a stipulation or settlement is not successful, then no document is prepared and the case proceeds to hearing. In at least one case with which I am familiar, several, but not all, of the parties reached a settlement; the CPUC then set the matter for public hearing in its normal manner. In this matter, the CPUC will conduct an open public hearing for which public notice is given, a record is created through a transcript by a court reporter, and there is full public access to such record or transcript.

I have discussed most, though perhaps not all, of the facts above with Ms. Carla Wardlow in the FPPC's Technical Assistance and Analysis Division, as well as Mr. John McLean, Esq., in the Commission's Legal Division. Neither Ms. Wardlow nor Mr. McLean feels confident that a lawyer's participation in such "workshops" or "settlement conferences" constitutes "administrative testimony" as that term is defined in the FPPC's regulations. However, I submit that such activity is well within the definition of "administrative testimony."

First, the lawyer is acting as counsel in, and providing written submissions which become part of the record of, the CPUC's public proceedings. The "workshops" or "settlement conferences" are conducted as meetings that are preliminary to, or facilitative of, the scheduled hearings. CPUC proceedings are conducted as open public hearings for which public notice is given; of which a record is created in a manner which makes possible the creation of a transcript; and with respect to which full public access is provided to such record and transcript and to all written material which is submitted to become part of the record.

Second, the activity involved is properly aimed at reducing the number of issues to be tried at a CPUC hearing. Neither commissioners nor administrative law judges participate in or observe these "workshops" or "settlement conferences" because the parties' ability to decide what issues really need hearing would

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be inhibited by their presence. The idea behind the "workshop" or "settlement conference" is to cut through all of the delays and game-playing that are so endemic to litigation. The purpose is to facilitate the preparation of a written submission, by some or all parties, which becomes part of the record of the CPUC's public proceeding. In at least one instance, the "workshop" or "settlement conference" involved the preparation of answers, by numerous parties in a single document, to inquiries from the presiding administrative law judge. Acting as counsel in such a "workshop" seems to be activity well within the definition of "administrative testimony."

What may make the matter seem uncertain at first is that a CPUC "workshop" or "settlement conference" appears to be different from anything anyone had in mind when the FPPC's regulations were written. However, the activity of participating in a "workshop" or "settlement conference" seems far closer to "administrative testimony" than it does to "lobbying activity." I doubt very strongly that lawyers participating in the settlement of the Diablo Canyon proceeding considered themselves lobbyists simply because they were trying to settle a complicated case rather than take it to two years of hearings.

A conclusion that participating in stipulation or settlement activity transforms a lawyer into a lobbyist is antithetical to the strong policy within California law of promoting and facilitating settlements wherever possible. Not only is such policy frustrated, but common sense is "stood on its head." The idea that participating in settlement meetings rather than a contested hearing transforms a lawyer regularly practicing before the Commission in its public hearings into a lobbyist would cause many such lawyers not to participate in "workshops" or "settlement conferences" because it would inadvertently make their clients and their firms into "lobbyist employers" subject to FPPC reporting requirements. This would effectively stymie the CPUC's efforts to promote settlements of its costly and time-consuming hearings.

For these reasons, I submit that a lawyer's participating in CPUC "workshops" or "settlement conferences" is within the meaning of "administrative testimony" as defined in the FPPC's rules.

If there is any further information which you require, or if I can be of assistance to the FPPC, please do not hesitate to contact me. Unless and until advised to the contrary, I will respectfully adhere to the position that participating in a "workshop" or "settlement conference" at the CPUC is within the meaning of "administrative testimony" as defined in the FPPC's regu-

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lations and, therefore, not register as a lobbyist. I look forward to a confirmation of that conclusion from your division.

Thank you for your assistance in this matter.

Very truly yours,



Earl Nicholas Selby

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cc: John McLean, Esq.